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No.

In The

Supreme Court of the United States

October Term, 1997

THOMAS A. FULCOMER, Warden State Correctional Institution at Huntingdon,

Petitioner,

vs.

RODERICK HERMAN FREY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court's decision in *Mills v. Maryland*, 486 U.S. 367 (1988), constitutes a new rule of law that, pursuant to *Teague v. Lane*, 489 U.S. 367 (1988), cannot be applied retroactively to award sentencing relief to a state prisoner whose conviction became final before the new rule was announced.

If *Mills* is properly applied retroactively to cases that were final before the decision was announced, whether its rationale requires sentencing relief where, as here, neither the trial court's instructions nor the verdict form explicitly or implicitly advised the jury that it must be unanimous as to the existence of mitigating circumstances and, to the contrary, made clear that unanimity was required only to find aggravating circumstances and to impose a sentence of death.

PARTIES TO THE PROCEEDING

The petitioner is:

Thomas A. Fulcomer, Warden, State Correctional Institution at Huntingdon

The respondent is:

Roderick Herman Frey

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The December 30, 1997, Judgment and Opinion of the United States Court of Appeals for the Third Circuit, Reversing the Order of the District Court is reported at 132 F.3d 916 (3d Cir. 1997), and is reprinted in the Appendix at App. D. The October 17, 1995, order of the District Court denying the petition for writ of habeas corpus is unreported but is reprinted in the Appendix at App. F.

STATEMENT OF JURISDICTION

Petitioner seeks review of the December 30, 1997, order of the United States Court of Appeals for the Third Circuit that reversed the October 17, 1995, judgment of the United States District Court for the Eastern District of Pennsylvania denying habeas corpus relief to respondent, Roderick Herman Frey, a state prisoner sentenced to death. Jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

In 1979, respondent, Roderick Herman Frey, arranged to have Charles Zehring kill his estranged wife, Barbara, for $5,000, which he borrowed from Barbara against the property settlement he expected upon their divorce. Zehring, in turn, hired Richard Heberlig to assist in the murder.

Frey arranged to meet with Barbara early in the morning of November 8, 1979, at the convenience store where she worked. He then provided Zehring with information about her schedule and the route she would likely take to the store. Posing as police officers, Zehring and Heberlig intercepted Barbara. The plan was to beat the woman to unconsciousness and then stage an auto accident. When she did not lose consciousness, the men panicked, and Heberlig shot her in the chest, killing her.

Frey subsequently confessed to the crime. Though he recanted the confession at trial, the jury convicted him of first degree murder. Following a separate penalty hearing, the jury found that the aggravating circumstance of a contract killing outweighed any mitigating circumstances and, on May 15, 1979, sentenced Frey to death.

The conviction and sentence were upheld on direct appeal, *Commonwealth v. Frey*, 504 Pa. 428, 475 A.2d 700 (1984), and following an unsuccessful collateral proceeding under Pennsylvania's Post Conviction Hearing Act (PCRA), 42 Pa. Cons. Stat. Ann. § 9541, *et seq.* (Purdon 1982). *Commonwealth v. Frey*, 512 Pa. 557, 517 A.2d 1265 (1986), *cert. denied*, 481 U.S. 1007 (1987).

Frey then filed a second PCRA petition, raising a variety of issues, including a claim that in the trial court's instructions to the jury at the penalty phase, the jury was not instructed that it could find the existence of a mitigating circumstance by less then a unanimous vote. The Court of Common Pleas denied PCRA relief. The Pennsylvania Supreme Court affirmed. *Commonwealth v. Frey*, 520 Pa. 338, 554 A.2d 27 (1989), *cert. denied*, 494 U.S. 1038 (1990).

Frey turned to the federal courts with a habeas corpus petition under 28 U.S.C. § 2254. Upon a finding that counsel

had provided ineffective representation and that the testimony of one Sharon Bowers had been improperly admitted at the penalty phase of the trial, the district court granted the writ, subject to the Commonwealth's right to hold a new sentencing hearing. The Commonwealth appealed. The Third Circuit vacated the district court's order, finding that, while counsel's representation at the penalty hearing was deficient, Frey was not prejudiced in the sense required by *Strickland v. Washington*, 466 U.S. 668 (1984), and, further, that he was not denied due process by the admission of Bowers' testimony. The court remanded for further consideration of other issues Frey had raised. *Frey v. Fulcomer*, 974 F.2d 348 (3d Cir. 1992).

On October 17, 1995, after an additional hearing and further briefing, the district court entered an order denying habeas relief (App. E). Frey appealed. The Third Circuit reversed, concluding that the trial court's instructions at the penalty phase were reasonably likely to have led the jury to believe that, in determining the sentence, it could consider only those mitigating circumstances it found unanimously, in violation of Mills. *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997) (App. D). The court denied rehearing and rehearing *en banc* on January 28, 1998. The order directing the Commonwealth to resentence Frey has been stayed pending resolution of this request for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE CIRCUITS HAVE SPLIT OVER THE QUESTION WHETHER MILLS ANNOUNCED A NEW RULE OF LAW WHICH, PURSUANT TO THIS COURT'S DECISION IN *TEAGUE v. LANE*,[1] CANNOT BE RETROACTIVELY APPLIED TO CASES ON COLLATERAL REVIEW. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE RETROACTIVITY ISSUE, WHICH THE THIRD CIRCUIT DECLINED TO ADDRESS UPON A FINDING THAT THE COMMONWEALTH'S FAILURE TO ASSERT THE TEAGUE BAR CONSTITUTED ITS WAIVER.

Although the Third Circuit found that this case presented the "close and difficult question" of whether this Court's decision in *Mills* amounts to a new rule of law, which, pursuant to *Teague v. Lane*, 489 U.S. 288 (1989) (plurality) cannot be retroactively applied on collateral review, it declined to reach the issue because the Commonwealth — relying on the Third Circuit's earlier decision in *Zettlemover v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991), which upheld in the face of a *Mills* challenge virtually identical jury instructions — had not raised the retroactivity argument.

This Court has made clear, however, that "lithe application of *Teague* is a threshold question in a federal habeas case." *Goeke v. Branch*, 514 U.S. 115, 115 S. Ct. 1275, 1276 (1995). *See also Schiro v. Farley*, 510 U.S. 222, 229 (1994) ("*Teague* analysis is ordinarily our first step" in reviewing federal habeas decision). And while the Court has also held that the Teague

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1. 489 U.S. 288 (1989).

question is not jurisdictional and thus may be waived, it has also observed that the Court has discretion to reach a *Teague* argument not preserved in the courts below. *Id.*

This is a case in which the Court should exercise its discretion and grant review to consider whether the *Teague* rule precludes application of *Mills* to cases on collateral review. The Circuits that have addressed the question are split. *Compare Miller v. Lockhart*, 65 F.3d 676 (8th Cir. 1995) (*Mills* announced a new rule of law that, per *Teague*, could not be applied retroactively on collateral review) and *Nethery v. Collins*, 993 F.2d 1154 (5th Cir. 1993) (same) *with Williams v. Dixon*, 961 F.2d 448 (4th Cir. 1992) (*Teague* does not bar retroactive application of *Mills*). *See also Zettlemoyer v. Fulcomer*, 923 F.2d at 306, n.19 (assuming in the absence of a decision from this Court that *Mills* would apply to cases on collateral review); *Frey v. Fulcomer*, 132 F.2d at ___, n.4 (noting the "thoughtful" analysis in *DeShields v. Snyder*, 829 F. Supp. 676 (D. Del. 1993), which concluded that Mills does not announce a new rule).[2]

The absence of a decision from this Court finally resolving the *Teague/Mills* question creates confusion and conflict in the state and lower federal courts, undermines the interest in finality that informs federal habeas jurisdiction, and results in disparate treatment of capital defendants whose juries received virtually identical instructions at penalty hearings occurring well before *Mills*, an outcome that is antithetical to a coherent and respected system of laws. It is a result that would be remedied by the grant of review to finally determine whether *Teague* bars the retroactive application of *Mills* or not. The decision below calls into question, and may require new penalty hearings, in scores

2. The Pennsylvania Supreme Court has held that *Mills* cannot be applied to cases on collateral review. *Commonwealth v. Peterkin*, 538 Pa. 455, 649 A.2d 121 (1994).

of pre-*Mills* death penalty cases in Pennsylvania alone. Surely, the propriety of applying *Mills* to ancient cases is a question sufficiently significant and far-reaching to warrant its resolution now, despite the failure of the court or the parties to address it below. For this reason alone, review should be granted.

II.

THE DECISION BELOW IN CONTRARY TO, AND CONSTITUTES A MISAPPLICATION OF, THIS COURT'S DECISIONS IN MILLS AND ITS PROGENY. IT IS ALSO CONTRARY TO THE DECISIONS OF OTHER CIRCUITS THAT HAVE HAD OCCASION TO CONSIDER JURY INSTRUCTIONS SIMILAR TO THOSE THAT WERE DELIVERED AT RESPONDENT'S PENALTY HEARING.

The Third Circuit panel determined that the jury charge provided at the penalty phase of respondent's trial was reasonably likely to have led the jurors to believe that, in reaching a penalty verdict, they could consider in mitigation only those mitigating factors they had unanimously found to exist. The court concluded that the instructions thus violated this court's decisions in *Mills v. Maryland*, 486 U.S. 367 (1988), and *McKoy v. North Carolina*, 494 U.S. 433 (1990), and required that respondent be provided with a new sentencing hearing. The panel's reasoning is flawed, based on a new method of analysis that the court invented especially for this case. The decision is result-oriented and illogical and, calling into question the bulk of Pennsylvania death penalty cases, should be carefully reviewed.

A. The decision below is unreasoned and fatally flawed.

The panel based its ruling on three factors: that the charge improperly "emphasized" the need for unanimous findings, that

the use of the phrase "unanimously find" appeared in too "close proximity" to the phrase "mitigating circumstances," and that the charge was significantly different from instructions previously approved by another Third Circuit panel in *Zettlemoyer v. Fulcomer*, 923 F.2d 284 (3d Cir. 1991). *Frey v. Fulcomer*, Slip Op. at 16 (App. D, 29a-30a). None of these rationales withstands analysis. The decision is contrary to this Court's pertinent decisions, those of other circuits construing similar instructions, and that of the Third Circuit itself. It is clearly and unequivocally wrong; it should be reviewed and reversed.

First, the fact that the charge repeated the need for unanimity does not remotely violate *Mills*. Of course, the charge discussed the concept of unanimity. The question under *Mills* is unanimity as to what? *Mills* prohibits unanimity to find the **presence** of mitigating circumstances. What the charge here clearly addressed, and what the panel simply missed, **was** unanimity to find the **absence** of mitigating circumstances.

The trial court instructed the jury in pertinent part:

> The Crimes Code provides that the verdict must be a sentence of death **if the jury unanimously finds** at least one aggravating circumstance and **no mitigating circumstance,** or if the jury **unanimously** finds one or more aggravating circumstances which outweigh **any** mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases. (App H, 62a)
>
> * * *
>
> Remember that your verdict must be a sentence of death **if you unanimously find** at least one aggravating circumstances (sic) and **no mitigating**

> **circumstances** or if you **unanimously** find one or more aggravating circumstances which outweigh **any** mitigating circumstances. In all other cases, your verdict must be a sentence of life imprisonment.

Frey, Slip Op. at 13-14 (App. H 64a) (emphasis supplied).

Because the trial court used the term "unanimously" four times, the panel concluded that it unduly emphasized unanimity and may have led the jury to believe that it need be unanimous as to mitigating circumstances.[3] The plain words of the charge

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3. The trial court's charge essentially tracked the **language** of Pennsylvania's death penalty statute, 42 Pa. C.S. § 9711(c), which requires the court to instruct the jury, *inter alia*, that: "[t]he verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in **all** other cases."

Pennsylvania's Suggested Standard Jury Instructions (Criminal) § 15.2502F(1) advises trial courts to instruct capital juries that:

> Your verdict must be a sentence of death if you unanimously find, that is, all of you find, at least one aggravating and no mitigating circumstance or if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. If you do not agree on one or the other of these findings, then the only verdict that you may return is a sentence of life imprisonment.

Plainly, the charge here was entirely consistent **with**, and indistinguishable from, both the death penalty statute **and** the standard jury instructions, the continued viability of **which are**, by virtue of the panel opinion, seriously in doubt.

belie this analysis: The charge **expressly** states (twice) that, in order to impose a sentence of death, the jury must unanimously find at least one **aggravating** circumstance and **no** mitigating circumstance or that it must unanimously find one or more **aggravating** circumstance(s) that outweigh **any** mitigating circumstances. There is **nothing** in the language of the instruction that directly or implicitly states the jury must be unanimous **to give credit** to any mitigating circumstance. Indeed, it says the **exact opposite:** that the jury must be unanimous as to a finding to no mitigating circumstances in order to impose a death sentence. The meaning of the charge is plain — absent unanimous agreement that no mitigating circumstances exist, the sentence must be life imprisonment. *Thus, if even one juror found a mitigating circumstance, the requirement that the jury unanimously agree there were no mitigating circumstances would be defeated, and the sentence would have to be life imprisonment.*

Only by ignoring the express words of the instruction was the court below able to conclude that the "emphasis" on unanimity somehow made the charge improper under *Mills*. Contrary to the panel's implicit suggestion, unanimity is not a verboten concept in a death penalty proceeding, and unanimity is not prohibited. Rather, it is required as to certain aspects — the ultimate verdict, the finding that aggravated circumstances have been proved, the finding that no mitigating circumstances exist, and the finding that aggravating circumstances outweigh the mitigating ones. Thus, a Pennsylvania jury must be instructed on the concept of unanimity, as the Pennsylvania death penalty statute provides. If the jury paid attention to the charge given here, and it must be presumed to have done so, the "emphasis" on unanimity made clear what had to be found unanimously if the sentence were to be death and that unanimity was not required to find the presence of mitigating factors.

Nor does the "close proximity" of the phrase "if you unanimously find" to the phrase "mitigating circumstances" support the Third Circuit panel's conclusion that the charge in this case violated Mills. Again, the plain English meaning of the instruction defeats the panel's analysis. Indeed, the "close proximity" of the locution "unanimously find" to the phrase "no mitigating circumstance" underscores the sense, and the propriety, of the instruction.

Nonetheless, employing a method of analysis that would require a court passing upon a similar claim to count the words between the terms "unanimous" and "mitigating" in the challenged instruction, and then to determine whether the separation between the terms amounts to one "sound bite" (a prohibited result) or more (a constitutionally acceptable one), the panel concluded that the instruction at issue here was reasonably likely to have misled the jury into thinking it need be unanimous to find mitigating circumstances, because the phrase "unanimously find" was but seven words from the phrase "mitigating circumstances" and thus not sufficiently remote to satisfy *Mills*. *Frey v. Fulcomer*, Slip Op. at 14 (App. D 27a, 28a). Of course, this Court did not count words or "sound bites" to arrive at its decision in *Mills*, nor to petitioner's knowledge has any other court in any published opinion attempted to resolve a *Mills* claim by recourse to modern media jargon. What constitutes a "sound bite" is, of course, not clear — the panel neither defined the phrase nor explained its special relevance here: whether the concept of "sound bite" can have any meaning in the legal analysis of a jury instruction and how a court might go about applying it in any consistent, non-arbitrary fashion certainly remain open to question. The constitutionality of a jury charge simply cannot turn upon this sort of analysis.

What the panel appears to have deduced via the sound bite discussion is that of the ten words starting with "unanimously

find" and ending with "mitigating," the jurors heard only the first two and the last and thus concluded they must find mitigating factors unanimously. There is no basis in English grammar or in any rule of law for this extraordinary determination of what the jury was reasonably likely to have done. The words of the charge are clear and reasonably simple; the phrase in question is relatively short; its syntax is not complex. There is no legitimate or logical ground upon which it can be inferred that the jury was capable of hearing and digesting the phrase "unanimously find" while simultaneously being incapable of hearing and digesting the phrase "no mitigating circumstances," or that it was reasonably likely that the jury just ignored the word "no" altogether and gave the entire phrase exactly the opposite meaning of what the plain words expressed. Nor is it reasonably likely that adult speakers of English are incapable of following and retaining a twelve-word phrase in its entirety as it is being spoken to them and of comprehending what it means. The panel's proximity analysis is unsupported, linguistic legerdemain that must he read as an inappropriate, result-oriented effort. It should not be permitted to stand or to control the disposition of the literally dozens of cases to which it is already being alleged to apply.

In any event, even if it is improperly assumed that the jury could conceivably have been misled by the spoken word, the verdict slip (reproduced in the Pennsylvania Supreme Court's opinion in *Commonwealth v. Frey*, 520 Pa. 338, 347, 554 A.2d 27, 31 (1989)), was surely sufficient to dispel its confusion, for its layout makes clear that the phrase "found unanimously" modifies these entire phrases: "[a]t least one aggravating circumstance and no mitigating circumstances" and "[o]ne or more aggravating circumstances which outweigh any mitigating circumstances." Like the oral instruction, the verdict slip in no manner indicates that the existence — as opposed to the nonexistence — of mitigating circumstances need have been

found unanimously to figure in the weighing process. The Third Circuit's easy dismissal of the verdict slip as irrelevant to its analysis of what the jury was reasonably likely to have understood its deliberative process to require is insupportable.

The panel's final reason for rejecting the jury instruction here was that it bore "a significant and distinguishing dissimilarity" from the charge approved by another Third Circuit panel in *Zettlemover v. Fulcomer*, *supra*, a case that has governed disposition of *Mills* claims in Pennsylvania for over six years. The significant, distinguishing dissimilarity the panel identified is entirely phantasmagorical: In *Zettlemoyer*, the word "unanimously" was separated from the word "mitigating" by sixteen other words, thus avoiding the "proximity" problem by purportedly creating more than one "sound bite." *Frey*, Slip Op. at 15 (App. D 28a). As discussed above, the proximity/sound bite analysis is meaningless — and thus dangerous — as a legal construct. What the panel should have done was analyze the plain meaning of the English sentence structure and words that were used to explain the relevant concept to the jury. Had it done so, it would necessarily have concluded that the *Zettlemover* charge, as a matter of English grammatical structure, is identical to the charge at issue here.[4] Both state that the law requires a sentence of death if the jury unanimously finds an aggravating circumstance and no mitigating circumstances or that the aggravating circumstance(s) outweigh any mitigating

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4. In *Zettlemoyer*, 923 F.2d at 307-08, the trial court charged in pertinent part:

> Under the law, you are obligated by your oath of office to fix the penalty at death **if you unanimously agree and** find beyond a reasonable doubt that there is an aggravating circumstances (sic) and either **no mitigating circumstances** or that the aggravating circumstance outweighs any mitigating circumstances.

circumstances. The *Zettlemoyer* court determined that the charge did not violate Mills, which it found "clearly distinguishable":

> Neither the court nor the verdict sheet stated that the jury must unanimously find **the existence** of particular mitigating circumstances or that the jury could weigh only those mitigating circumstances which it found unanimously.

923 F.2d at 308 (emphasis supplied). So, too, here, neither the court nor the verdict sheet told the jury that it must find or that it could weigh only mitigating circumstances it had found unanimously.[5] Only by engaging in foundationless mental gymnastics was the panel able to conclude to the contrary.[6]

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5. The panel below conceded that the verdict slip provided to respondent's jury is "substantially the same" as the verdict slip used in *Zettlemoyer*. *Frey*, Slip Op. at 16 (App. D). Though the *Zettlemoyer* court concluded that the form of the verdict slip cut against Zettlemoyer's argument, 923 F.2d at 308, the panel here reached the opposite conclusion, finding that Pennsylvania's later adoption of a uniform verdict slip that requires the jury to list the mitigating circumstances "found by one or more of us," Pa. R. Crim. P. 358A, amounts to an admission that verdict forms like the one used here and in *Zettlemoyer* contained a fatal flaw that violated *Mills*. *Frey*, Slip Op. at 17-18 (App. 19-20). This is entirely contrary to the **express** statement of the Pennsylvania Supreme Court that

> the purpose of Rule 358A is simply to provide statewide uniform sentencing slips in death penalty cases and in no way suggests that the prior sentencing procedures employed in Pennsylvania were improper.

Commonwealth v. Banks, 540 Pa. 143, 153 n.9, 656 A.2d 467, 472 n.9 (1995).

6. For example, in addition to the "sound bite" analysis, the (Cont'd)

The panel's appropriation of the "sound bite" concept in lieu of genuine legal analysis and its attempt to distinguish the charge from its own precedent in *Zettlemoyer* is baseless.

(Cont'd)
panel suggested that the *Zettlemoyer* charge was upheld only because its phraseology would have been reasonably likely to have been understood to mean:

> [Y]ou must fix the penalty at death if you unanimously agree to the ultimate conclusion that either there is an aggravating circumstance and no mitigating circumstances or that the aggravating circumstance outweighs any mitigating circumstances.

Frey, Slip Op. at 12 (App. D). How this differs in English meaning from the charge Frey received — that the penalty must be death "if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance . . . or one or more aggravating circumstances which outweigh any mitigating circumstances" — is entirely unclear. Both instructions tell the jury that what the panel called the "ultimate conclusion"— "an aggravating circumstance and no mitigating circumstance or an aggravating circumstance that outweighs any mitigating circumstance" — must be unanimous. Surely, the *Zettlemoyer* charge cannot be distinguished, as the panel attempted to do, because it used the phrase "agree and find" rather than just the word "find." In context, the phrase and the word have the same meaning and tell the jury the same thing. Contrary to the panel's discussion, the *Zettlemoyer* charge was not saved by use of the word "agree," and absence of the term does not defeat the charge here. Like the charge in *Zettlemoyer*, this charge did not tell the jury "that each interim step in its deliberations must be unanimous," *Zettlemoyer*, 923 F.2d 308, only that its "ultimate conclusion" must be. "That the jury must unanimously agree [find] that the aggravating must outweigh the mitigating is not the same as unanimously agreeing [finding] that a mitigating factor exists." *Id.*

B. The panel opinion misapplies this Court's Decisions in *Mills*, *McKoy*, and *Boyde*.[7]

In *Mills*, this Court found that Maryland's capital sentencing procedure improperly precluded the sentencer from considering mitigating circumstances. In the Maryland procedure, the jury was to consider mitigating circumstances on a verdict form, and was instructed to write "yes" next to those it **unanimously** concluded were proved by a preponderance of the evidence. Otherwise, the jury was instructed to write "no" on the form next to a particular circumstance. A lack of unanimity would produce a "no" result and preclude consideration of any given mitigating circumstance so disposed of, permitting a single juror to "veto" any and all mitigating circumstances and preclude their consideration against aggravating circumstances in a weighing process.

Here, as discussed above, the charge provided to respondent's jury did not instruct that the jurors had to be unanimous in finding mitigating circumstances. On the contrary, the court charged that the jury had to be unanimous in finding **no** mitigating circumstances. Where the Maryland instructions explicitly required a unanimous "yes" in order to qualify a mitigating factor for the weighing stage, the instructions here required the weighing of "any" mitigating circumstance. Where Maryland required a finding of "no" mitigating circumstances from a **failure** to be unanimous, the instructions here required unanimity in order to find that there were **no** mitigating circumstances. In the absence of such a finding, a weighing process was required. The procedure outlined in the instructions here did not resemble Maryland's; it was its polar opposite. The attempt of the lower court to find a *Mills* violation in the

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7. *Mills v. Maryland*, 486 U.S. 367 (1988); *McKoy v. North Carolina*, 494 U.S. 433 (1990); and *Boyde v. California*, 494 U.S. 370 (1990).

instructions in this case represents an insupportable and unwarranted misapplication of *Mills* that surely cannot be permitted to stand.

Nor, of course, do the instructions at issue here bear any relationship to the flaws this Court found in *McKoy*, in which the capital sentencing scheme, as well as the instructions and verdict slip provided to the jury, all **expressly** required the jurors to unanimously agree as to **the existence** of any mitigating circumstance before the circumstance could be considered in arriving at the penalty. Here, the jury was never told, directly or indirectly, that it must find mitigating circumstances unanimously; it was told the opposite — that it must unanimously find **no** mitigating circumstances. To the extent that the panel relied on *McKoy* as additional support for its result, its reliance was clearly and wholly erroneous.

In *Boyde*, this Court clarified the standard for assessing a jury instruction that, as here, is allegedly ambiguous and therefore subject to an erroneous interpretation:

> We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.

494 U.S. at 380. The Court cautioned that "a capital proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition." *Id.* Here, as discussed above, it is difficult to see how there was **any** possibility that **any** juror, let alone the entire jury, understood the trial court's instruction to mean that the jurors must be unanimous to find the presence of mitigating circumstances. Certainly, if the jurors understood the English language, there is no **reasonable**

possibility that they believed they were precluded from weighing mitigating factors not found unanimously. While the panel purported to apply *Boyde's* "reasonable possibility" test, it in fact engaged in the search "for subtle shades of meaning" and "speculation" that *Boyde* eschews. 494 U.S. at 380-81.

The panel's opinion is inconsistent with and misapplies the *Boyde* standard, as well as the substantive holdings of *Mills* and *McKoy*. It is, moreover, incompatible with the decisions of other Circuits that have construed similar instructions and rejected claims of error based on *Mills* and *McCoy*. *E.g.*, *Griffin v. Delo*, 33 F.2d 895, 905-06 (8th Cir. 1994) (instructions that jury must unanimously find that mitigating circumstances outweighed aggravating circumstances did not imply that jury must be unanimous in finding a mitigating circumstance); *Lawson v. Dixon*, 3 F.3d 743, 754 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1208 (1994) (same: court charged, as here, that jury must unanimously find that aggravating circumstance outweighed "any" mitigating circumstance); *Maynard v. Dixon*, 943 F.2d 407, 418-420 (4th Cir. 1991); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1120-1121 (6th Cir. 1990) (*en banc*), *cert. denied*, 499 U.S. 970 (1991) (same; court charged that jury must be unanimous in finding any aggravating circumstance but was silent on how many jurors had to find any mitigating circumstance). *See also DeSheilds v. Snyder*, 829 F. Supp. at 688-89 (court's instruction that jury must unanimously find that aggravating circumstances outweighed any mitigating circumstances did not suggest unanimity as to mitigation and did not violate *Mills*).

Because the decision below is at odds with, and is a wholly unwarranted extension of, *Mills* and *McCoy*, it should be reviewed by writ of certiorari and reversed.

CONCLUSION

For these reasons, petitioner respectfully requests that a writ of certiorari issue to review the decision below.

Respectfully submitted,

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